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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 168

ALBERT WILLIAMS JOHNSON, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims overruling the Government's demurrer (R. 8-20) is reported at 111 C. Cls. 750 and 79 F. Supp. 208. The opinion of the Court of Claims dismissing petitioner's suit upon special findings of fact (R. 26-31) is reported at 104 F. Supp. 106.

JURISDICTION

The judgment of the Court of Claims was entered on April 8, 1952 (R. 32). The petition for a writ of certiorari was filed on July 1, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in holding that petitioner was estopped to claim a salary upon resignation as a federal judge where, to avoid and prevent his impeachment, petitioner filed with the House Judiciary Committee a written waiver under seal of any and all rights to such salary, and the House Judiciary Committee, acting on the intended inducement of that waiver, did not recommend impeachment.

STATUTES INVOLVED

28 U.S.C. (1940 ed.) 375, as amended May 11, 1944, 58 Stat. 218, and the Act of June 24, 1946, 60 Stat. 304, are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

Petitioner brought this action in the Court of Claims to recover the salary to which he claimed to be entitled under the provisions of 28 U.S.C. (1940 ed.) 375,[1] upon his resignation as a judge of the United States District Court for the Middle

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[1] 28 U.S.C. (1940 ed.) 375 has been succeeded by 28 U.S.C. 371.

District of Pennsylvania. The facts attendant upon his resignation may be summarized as follows:

For several months prior to June, 1945, a subcommittee of the House Judiciary Committee had been conducting an investigation of the official conduct of petitioner, and he had been invited to appear as a witness at the hearings of the subcommittee (Fdg. 3, R. 22). Petitioner, who had attained the age of 72 and had held the office of United States District Judge for more than twenty years, submitted his resignation to the President of the United States on June 29, 1945 (R. 1, Fdg. 2, R. 22). On July 3, 1945, the President accepted the resignation (Fdg. 2, R. 22). Thereafter, on July 13, 1945, petitioner, accompanied by three counsel, appeared before the subcommittee and was examined and cross-examined. Following the evening recess of the committee, he conferred for approximately three hours with his three attorneys and his son. On the following morning, in order to avoid the embarrassment of further cross-examination and with the expectation that there would be "no further prosecution," petitioner decided to renounce his right to the salary due judges upon resignation (Fdg. 4, R. 22-23, R. 31). Accordingly, he signed and, through one of his counsel, submitted to the subcommittee the following letter:

Committee on the Judiciary, House of Representatives, United States:

I have tendered my resignation as United States District Judge of the Middle District of Pennsylvania to the President of the United States which was accepted July 3, 1945.

I herewith now further renounce and relinquish any right, including financial benefits that I may have under the retirement provision of the Act of Congress, Judicial Code, Section 260, cited in Title 28, United States Code, Section 375, as amended.

In witness whereof I have hereunto set my hand and seal this fourteenth day of July A. D. 1945.

Albert W. Johnson. (Seal.)

Witnessed by: M. J. McDonald, J. H. Bigelow, Thomas M. Lewis. [Fdg. 4, R. 23-24.]

On February 25, 1946, the House Judiciary Committee submitted its report on the investigation of the official conduct of petitioner, House Report No. 1639, 79th Cong., 2d Sess., 92 Cong. Rec. 1592. The report adopted the findings of the subcommittee that petitioner was guilty of such high crimes and misdemeanors as would ordinarily require the interposition of the impeachment powers of the House; that petitioner had notori-

ously engaged in the barter and sale of court offices, notably in bankruptcy proceedings; that his decisions, decrees, orders, and rulings had been sold "for all 'the traffic would bear';" and "that his judicial conduct generally was tainted with fraud * * *." However, because petitioner's resignation had removed him from office, because his age and record precluded him from ever seeking another office, and because of his waiver of any right to salary upon resignation, the committee reluctantly reached the conclusion that, the effect of a judgment in impeachment having been attained, a recommendation for impeachment could not be justified in view of the many issues of vital concern then occupying the attention of the Senate. In order to insure that neither petitioner nor his estate would ever receive any of the salary waived by petitioner, the committee recommended the enactment of special legislation to accept his renunciation of the salary payable to judges upon resignation under 28 U.S.C. 375. On June 24, 1946, such an act was adopted and approved. 60 Stat. 304.

In the meantime, on February 8, 1946, petitioner had addressed a letter to the Director of the Administrative Office of the United States Courts, the Comptroller of the Currency, and the Secretary of the Treasury, alleging that he had been ill and incapacitated physically and mentally and therefore unable to realize the import of his

action at the time he executed the waiver of his right to the salary due upon resignation to a federal judge. The letter purported to revoke his waiver and demanded payment of his salary (R. 3). Payment having been refused, petitioner instituted this proceeding in the Court of Claims.

On the Government's demurrer to the petition, the Court of Claims held that, if petitioner was mentally competent at the time he executed the waiver, he was estopped to claim the benefits he had waived. Because the Government's demurrer admitted the allegation of mental incapacity, the court overruled the demurrer and referred the case to a commissioner for the taking of proof on that issue (R. 16-17). Thereafter, the commissioner filed a report (R. 22-25), which was adopted by the court (R. 26-29), finding that petitioner thoroughly understood the nature and consequences of his act in waiving his claim to the benefits accorded judges upon resignation. Upon these findings, the Court of Claims entered a judgment dismissing the petition (R. 31).

ARGUMENT

Although petitioner advances a variety of questions as a basis for the granting of certiorari (Pet. 8), this unique case, reduced to its essentials, turns upon the application of the well-established principles of estoppel to the peculiar facts attendant upon petitioner's resignation and his

waiver of any rights to the salary provided for judges upon resignation.

At the outset it may be well to note that this case does not involve the Constitutional provision that the compensation of federal judges "shall not be diminished during their continuance in office" (U. S. Const. Art. III, § 1). A judge who retires continues to hold office; he may still perform the duties of the office; and he is entitled to the Constitutional protection against diminution of his compensation during his continuance in that office. *Booth* v. *United States,* 291 U.S. 339. However, a judge who resigns, as did petitioner, vacates his office and is no longer eligible to perform the duties of the office. See *Booth* v. *United States, supra,* 348-351; *Clark* v. *United States,* 109 C. Cls. 444, certiorari denied, 333 U.S. 833; *Bourquin* v. *United States,* 108 C. Cls. 700, certiorari denied, 332 U.S. 762. Likewise unnecessary for disposition of the pending petition is extended consideration of either the jurisdiction of the court below or the accuracy of its holding that petitioner had a contractual right to payment of the salary provided for judges upon resignation.[2]

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[2] It should be noted, however, that the jurisdiction of the Court of Claims in this case is doubtful in view of the limitation imposed by 28 U.S.C. 1501, which provides that "The Court of Claims shall not have jurisdiction of any claim for a pension." Cf. *Randolph* v. *United States,* 158 F. 2d 787 (C.A. 5), certiorari denied, 330 U.S. 839; *Morgan* v. *United States,* 115 F. 2d 426 (C.A. 5); *United States* v. *Beaman,* 61

As the Court of Claims held, this case may be disposed of on the simple and plainly applicable ground of estoppel. From the allegations of the petition (R. 1-6), the report of the House Judiciary Committee, H. Rep. No. 1639, 79th Cong., 2d Sess., and the special findings of the court below (R. 26-29), it appears that at the time petitioner resigned from office his official conduct was being investigated by a subcommittee of the House Judiciary Committtee with a view toward recommending his impeachment. Although he resigned, the investigation continued, and petitioner appeared as a witness before the subcommittee. After an afternoon of cross-examination which was apparently embarrassing to petitioner, he conferred with his counsel and decided to execute a waiver of any rights which he had to a salary

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F. 2d 493 (C.A. 5); *Smith* v. *United States*, 57 F. 2d 998 (C.A. 4); *Lemly* v. *United States*, 75 F. Supp. 248 (C. Cls.); *Gordon* v. *United States*, 26 C. Cls. 307. Further, it is our view that the Court of Claims may well have erred in holding that petitioner obtained a contractual right to the salary provided for the benefit of judges upon resignation. "The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education*, 302 U.S. 74, 79; cf. *Phelps* v. *Board of Education*, 300 U.S. 319; *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U.S. 379; *Butler* v. *Pennsylvania*, 10 How. 402. Particularly where no contribution to a retirement fund has been made, cf. *Dismuke* v. *United States*, 297 U.S. 167, would the salary provided appear to be subject to revocation at the will of the sovereign.

upon resignation. This he did, with full and complete understanding of the nature and consequences of his act, in order to avoid further cross-examination and with the expectation that there would be "no further prosecution." The execution of the waiver had its intended effect: the House Judiciary Committee, noting that the full extent of a judgment in impeachment had thereby been reached, U.S. Const. Art. I, § 3, did not recommend impeachment of petitioner because of the many matters of vital concern then occupying the attention of the Senate. Having reaped the desired benefit of his act, petitioner now seeks to claim that which he renounced with the solemnity of a sealed instrument.[3]

As stated by the Court of Claims (R. 15-16), regardless of whether there was an offer and accept-

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[3] It may be noted that under the law of Pennsylvania (*Land Title Bank and Trust Co.* v. *Freas*, 334 Pa. 26, 5 A. 2d 165; *Balliet* v. *Fetter*, 314 Pa. 284, 171 A. 466; see also 33 Purdon's Pennsylvania Statutes § 6), with which petitioner is no doubt familiar, as well as the general law of contracts, Restatement, *Contracts* (1932) § 110, consideration is not necessary to support a promise made under seal. Nor is acceptance of the promise necessary if the promisee does not reject it upon discovery thereof. Restatement, *Contracts* (1932) § 104. Although there may be some doubt as to the validity of a distinction between sealed and unsealed contracts in the ordinary commercial situation, execution of a promise under seal may be an efficacious way of making a binding obligation without consideration. In any event, petitioner's argument that no consideration was given for his waiver is irrelevant, because this case turns upon the principles of estoppel and not those of contract law.

ance in the contractual sense, petitioner "is estopped in equity and good conscience to assert any claim to those things which he renounced in order to prevent impeachment. No court should lend its aid to recover benefits renounced under such circumstances. To do so would be to countenance the grossest bad faith. It would put the court's stamp of approval on trickery and deceit."

Petitioner seeks to avoid the effect of an estoppel by citation of a line of cases holding that no estoppel can arise from the failure to object to payment of less than the salary provided by statute for public offices (Pet. 17-24). However, such cases are not in point. They deal with the claims of employees holding and performing the duties of office, whereas petitioner resigned his judgeship and no longer holds office. See pp. 3-4, 7, *supra;* cf. *MacMath* v. *United States,* 248 U.S. 151; *Barbour* v. *United States,* 17 C. Cls. 149. They reflect the judicial concern for protecting the standards of employment set by the legislature from detrimental action by the executive branch, cf. *Cochnower* v. *United States,* 248 U.S. 405. This case, on the other hand, involves no effort to thwart the legislative will by reducing or eliminating the pay of an office fixed by statute. Petitioner here voluntarily renounced his pay, which he admittedly could do (see Pet. 20-21), and the only question is whether, after reaping the benefit of that renunciation, he is estopped in the circumstances of this case to withdraw it.

Petitioner also suggests (Pet. 25) that, if he was believed to be guilty of the offenses mentioned in the report of the House Judiciary Committee, Congress had no alternative but to try him by impeachment. Merely an elaboration of the misconceived argument that he made no "contract" with Congress, this suggestion overlooks the dispositive fact that, whether or not he ought to have been impeached, petitioner's renunciation of any further salary payments was intended to lead, and actually led, to abandonment of the proposed impeachment proceedings. He can scarcely be heard now to argue that his purpose was improper and that he should therefore be permitted to nullify the waiver by which he accomplished that purpose.[4] There is, in short, no ground for the argument that this Court should attempt to control the discretionary powers of impeachment, vested exclusively in the House of Representatives, by failing to give effect to the estoppel raised by petitioner's acts before a duly constituted committee of that House. Cf. *United States* v. *Thompson*, 251 U.S. 407; *Confiscation Cases*, 7 Wall. 454; *Howell* v. *Brown*, 85 Supp. 537 (D. Neb.); *United States* v. *Brokaw*, 60 F. Supp. 100 (S.D. Ill.).

There remains for consideration petitioner's contention that the Court of Claims erred in

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[4] Cf. *Daniels* v. *Tearney*, 102 U.S. 415, holding that one who had benefited from the use of an unconstitutional statute was estopped to assert its unconstitutionality as a defense in a suit on a bond executed pursuant to the statute; *Fahey* v. *Mallonee*, 332 U.S. 245, 255-6.

taking judicial notice of the report of the House Judiciary Committee (Pet. 26-30). This contention rests primarily on a misapprehension of the purpose for which the Court took judicial notice of the report. It did not do so to determine whether or not petitioner was guilty of the charges contained in the report, but merely to verify the facts giving rise to the estoppel—that impeachment was being considered and that petitioner's "resignation and renunciation caused the committee to decide not to recommend impeachment." (R. 15.) The reference to the report was clearly proper; it is well-established that a court may take judicial notice of such matters of public record. *Tempel* v. *United States,* 248 U.S. 121; *Brown* v. *Piper,* 91 U.S. 37; *Savannah River Electric Co.* v. *Federal Power Commission,* 164 F. 2d 408 (C.A. 4); *Moore* v. *Cleveland Railway Co.,* 108 F. 2d 656 (C.A. 6); *United States* v. *Aluminum Company of America,* 1 F.R.D. 71 (S.D. N.Y.).

Because the Court of Claims correctly decided this case on the familiar ground of estoppel, it is unnecessary for this Court to consider the constitutionality of the Act of June 24, 1946, 60 Stat. 304, *infra,* pp. 14-15, accepting petitioner's renunciation of his rights to the salary of a resigned judge. However, that Act is clearly distinguishable from the type of legislation involved in *United States* v. *Lovett,* 328 U.S. 303; it constitutes no

more than the acceptance of an offer, the intended irrevocability of which is evidenced by its seal. See footnote 3, *supra*, p. 9. Nor does the Act of June 24, 1946, in any way operate as a permanent bar to further employment of petitioner or a perpetual exclusion from a chosen profession. Cf. *United States* v. *Lovett, supra*, 313-314, 316.

Finally, in addition to the fact that petitioner's contentions are without merit, it seems clear that this unique case is not of such general importance as to warrant review by this Court. No similar or related case has arisen since provision was first made by the Act of April 10, 1869, 16 Stat. 44, 45, Rev. Stat. § 714, for the payment of salaries to federal judges resigning their offices.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

SEPTEMBER, 1952.

APPENDIX

28 U. S. C. (1940 ed.) 375, as amended May 11, 1944, 58 Stat. 218, provided:

> When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. * * *

The Act of June 24, 1946, 60 Stat. 304, provides as follows:

> An Act to accept the renunciation by Albert W. Johnson of pension under section 260 of the Judicial Code.
>
> *Be it enacted* * * * That after July 14, 1945, no payment shall be made under section 260 of the Judicial Code [28 U.S.C. (1940 ed.) 375, *supra*] to Albert W. Johnson (or his estate), formerly district judge of the District Court of the United States for the Middle District of Pennsylvania, who resigned as such judge on July 3, 1945, and who, on July 14, 1945, renounced and relinquished his rights under

section 260 of the Judicial Code to receive the salary therein provided for judges who resign after having served at least ten years and having attained the age of seventy years.

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